SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Together Forward.

January 2, 2019

Samantha Deshommes
Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529

Re: Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens (DHS Docket No. USCIS-2008-0014)

Dear Ms. Deshommes:

The Society for Human Resource Management (SHRM) thanks you for the opportunity to comment on the notice of proposed rulemaking (NPRM) "Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens" (DHS Docket No. USCIS-2008-0014). SHRM urges the agency to ensure that the registration system works as intended and incorporates stakeholder feedback before it is required for use by all applicants.

SHRM is the world's largest HR professional society, representing 300,000 members in more than 165 countries impacting 117 million employees. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and the United Arab Emirates.

In October 2018, SHRM's affiliate, the Council for Global Immigration (CFGI) ceased being an affiliate of SHRM and was fully integrated into our organization. With the integration, SHRM continues to advance employment-based immigration and bridge the public and private sectors to promote sensible, forward-thinking policies that foster innovation and global talent mobility. CFGI, formerly known as the American Council on International Personnel (ACIP), has commented on all H-1B regulations since 1972, including the previous electronic filing proposal.[1] This topic has been a subject of great discussion at stakeholder meetings and our annual Symposium and we appreciate the opportunity to provide our insights.

SHRM supports the broad goal of electronic filing at USCIS and, in principle, supports an electronic H-1B lottery process that is part of the broader electronic filing environment. Ultimately, as we noted in our 2011 comments on a similar H-1B registration proposal, the best path forward would be to develop the registration portal and the electronic filing process in tandem. However, in the short term and in the absence of a way to file full H-1B petitions electronically, we submit the following comments and recommendations.

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[1] "Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations." 76 FR 11686 (Mar. 3, 2011).

I. After FY 2020 and full testing and vetting, provide reasonable notice and incorporate stakeholder input in the final registration system.

We appreciate the inclusion of a provision that allows the agency, should this rule be finalized prior to April 2019, to suspend implementation beyond fiscal year (FY) 2020 to fully test and vet the system. This was followed by a December 3 tweet[2] in which the agency indicated it would likely not implement the system until FY 2021 if finalized as proposed. We believe such delayed implementation is prudent for the reasons below.

A. Meaningful consideration of stakeholder recommendations and engagement in system testing is necessary.

USCIS should take the time to carefully review and make modifications based on comments before finalizing the proposal. Some recommendations could be quickly addressed in a final rule while others might take longer, but meaningful consideration should be given to all recommendations.

Employers and law firms should be active participants in the testing and vetting process as they will be the front-end users of the system and are best positioned to identify issues that might not be clear on the back end. Furthermore, to ensure efficiency, employers and law firms should be given the opportunity to see the electronic form and registration portal, and familiarize themselves with them, well in advance of any registration period. In our experience, beta testing and demonstrations with end users contributed to the successful rollout of electronic filing for the LCA and PERM.

B. Efficiencies are unlikely to be gained in FY 2020.

The FY 2020 filing opens on April 1, 2019 and many of our members report they are already preparing their paper petitions. Unless changes in the system are announced immediately, significant resource savings for employers are unlikely for FY 2020. And, in fact, a rushed registration system would add a burden on employers who would have to interrupt their long-established processes to adjust to a new system.

The net result for FY 2020 would be an additional 30 minutes per registration[3] with no time saved for case preparation. With current uncertainty regarding whether the rule will be in effect, employers do not have enough time to wait and see if an electronic registration system is finalized. Instead, they need to prepare paper petitions for all cases regardless of whether they are selected in the H-1B lottery.

Instead of adding this burden in FY 2020, the agency should focus on ensuring savings in future years when employers would have more time to prepare.

II. Improve the registration and filing process to allow for greater efficiency gains.

For an H-1B registration system to be successful, it must be implemented in a way that actually saves time for employers (i.e. an actual ability to avoid preparing paper filings). This can only be achieved if enough time is provided for employers, after notification of lottery selection, to prepare a full paper petition. For the reasons stated above, those efficiency gains are unlikely in FY 2020. In FY 2021 and beyond, efficiency gains are likely possible if the following modifications are made.

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[2] USCIS, "It is likely that the FY 2021 cap season would be the first time that electronic registration is required, if the rule is finalized as proposed." December 3, 2018, 11:25 AM.
https://twitter.com/USCIS/status/1069673979454074883

[3] Estimate from the NPRM.

A. Increase the registration period to four weeks.

We retain this recommendation from our 2011 comments. A four-week registration process would align with the four-week registration process for the diversity visa lottery. We further recommend that the registration system allow employers the option to enter, save and review data before submitting the request. This would give employers adequate time and assurance that data is entered accurately.

B. Keep information required for registration to a minimum.

The NPRM indicates that the registration system would electronically collect basic information sufficient to run the lottery including, but not limited to, employer name, identification number and address; information about employer's authorized representative; beneficiary's biographical information; whether the beneficiary has a U.S. master's degree or higher; and attorney information and associated Form G-28. The specifically listed items are reasonable and sufficient to run the lottery and, as such, the information collection should be limited to these items.

C. Lengthen the period for filing selected cases to 90 days and allow for 30-day extension requests.

The NPRM proposes staggered filing periods of at least 60 days each for petitioners to file cases selected in the registration process. For instance, USCIS might require certain selected cases to be filed between April 1 and May 31, while requiring other selected cases to be filed between May 1 and June 30. The NPRM gives USCIS flexibility with regard to the number and length of filing periods, and the volume of filings in each period.

Our members express that 60-day filing periods, some of which will start on April 1, would not be sufficient to allow them and their counsel to avoid preparing paper filings for unselected cases. High volume employers and counsel simply would not have enough bandwidth to prepare paper petitions for all selected cases in a 60-day window.

A 90-day filing window would be more likely to result in efficiency gains. That would provide more time to obtain a certified Labor Condition Application from the Department of Labor, obtain and assemble required documentation and prepare paper-based petitions after being notified of selection.

Furthermore, USCIS should allow for 30-day extensions of filing periods if, for whatever reason, the petitioner is unable to meet a filing deadline. This would extend the full possible filing period to 120 days. This is long enough to ensure efficiencies are gained for employers but short enough to allow USCIS to adequately measure actual rate of filings and ensure all H-1B cap numbers are used during a given fiscal year.

D. Create an H-1B document library, modeled after the Known Employer Document Library, to allow employers to substantially reduce the size of paper filings

With every H-1B petition, employers are required to provide substantial documentation about the employer itself, including annual reports, tax documents, and other documentation sufficient to establish that it is a bona fide employer with the ability to pay the employee. Such documentation does not vary from one H-1B petition to the next, yet it is required to be filed every time. For example, a petitioner filing 500 H-1B petitions must file the same paperwork 500 times.

In conjunction with the registration process, USCIS should create an "H-1B Document Library" allowing employers to upload these key documents one time so they do not have to do so with each H-1B petition. USCIS already has a model for this – the "Known Employer Document Library" – which was developed in conjunction with the Known Employer Pilot. USCIS should consider expanding that pilot to more employers, allowing precertification of the bona fides of those employers. Regardless of expansion, however, the "H-1B Document Library" should be created to save substantial time and money in the preparation of paper-based filings.

III. Ensure reasonable timing of adjudications and fairness by expanding cap-gap relief and refraining from premium processing suspensions.

With filing periods starting on April 1 and ending, at the very earliest, on May 31, the window will shrink for employers to obtain approved H-1Bs by the October 1 start date for any given fiscal year with regular processing. As such, F-1 students on optional practical training (OPT) "cap-gap" extensions are unlikely to have an approved H-1B before their cap-gap period ends and would have to be taken off payroll while they wait for their H-1Bs to be approved. DHS should adjust its cap-gap regulations to allow OPT students to continue to work in F-1 OPT status until the H-1B has been adjudicated.

Additionally, USCIS should refrain from suspending H-1B premium processing, as has become commonplace, or at a minimum lift any premium processing suspension by September 1 of a given fiscal year to ensure adjudications can be completed by October 1. This relieves the cap-gap implications of this NPRM, and ensures employers can generally access the talent they need in reasonable timeframes.

IV. Collect I-129 form fee through the system as a disincentive for speculative or prospective registrations.

We appreciate that USCIS intends to make efforts to avoid fraudulent or bad faith registrations, as it would be extremely unfortunate if unscrupulous employers "gamed" the registration system to gain an unfair advantage in the H-1B lottery through speculative or prospective registrations.

As we mentioned in our 2011 comments, one disincentive for speculative or prospective registrations would be to collect the $460 fee for Form I-129 through the registration process. The most practical and effective method would be to collect credit card information with an agreement that the card will be charged at the time of selection, regardless of whether a petition is ultimately filed.

V. Include provisions to ensure all 85,000 H-1Bs are used in any fiscal year with sufficient demand.

USCIS intends to allocate more overall cases to individuals with U.S. advanced degrees by running the regular cap selection process before the U.S. advanced degree cap selection process. USCIS asserts in the NPRM that this would allocate approximately 5,340 more H-1Bs to those with U.S. advanced degrees.[4]

In recent fiscal years, this proposal would not have affected the ability of USCIS to ensure all 85,000 H-1Bs were allocated. However, in years with lower filing volume, the proposal could result in properly filed H-1Bs being rejected without hitting the 85,000 cap. Thus, we recommend that, should the agency move forward with reversing the lottery, it implement the following steps:

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[4] SHRM estimates, based on fiscal year 2019 filing numbers, that the proposed reversal would have allocated approximately 3,788 more H-1Bs to those with U.S. advanced degrees, somewhat short of USCIS' estimates of what could be gained in future years. Nevertheless, SHRM agrees with the general logic that a shift toward more U.S. advanced degree H-1B recipients would occur.

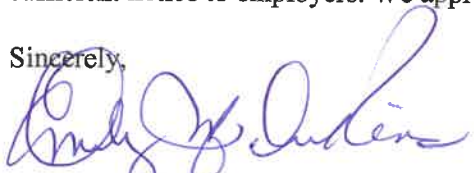
1) Conduct the regular lottery.
2) Conduct the U.S. advanced degree lottery.
3) If the U.S. advanced degree cap has not been hit, shift individuals with U.S. advanced degree cases selected under the regular lottery to count against the U.S. advanced degree cap of 20,000.
4) If any cases remain unselected from the overall pool of registrations, fill the remaining spots under the regular cap of 65,000. If not, reopen the registration period.

Below are a few scenarios of how this would work.

Scenario 1 (based on FY 2019 filings)	*Scenario 2 (moderately low filing)*	*Scenario 3 (significantly low filing)*
95,885 U.S. advanced degree cases filed. 94,213 other cap cases filed.	50,000 U.S. advanced degree cases filed. 50,000 other cap cases filed.	35,000 U.S. advanced degree cases filed. 35,000 other cap cases filed.
Regular cap filled (Approximately 32,786 U.S. advanced degree cases and 32, 214 other cases) U.S. advanced degree cap filled (20,000 cases)	Regular cap filled (Approximately 32,500 U.S. advanced degree cases and 32,500 other cases) U.S. advanced degree cap not filled (17,500 cases)	Regular cap filled (Approximately 32,500 U.S. advanced degree cases and 32,500 other cases) U.S. advanced degree cap not filled (2,500 cases)
No further steps necessary.	2,500 U.S. advanced degree cases selected under the regular cap shifted to fill the U.S. advanced degree cap. 2,500 previously unselected cases used to fill the vacated spots under the regular cap. No need to reopen registration.	17,500 U.S. advanced degree cases selected under the regular cap shifted to fill the U.S. advanced degree cap. Remaining 250 unselected cases get a spot under the regular cap. This leaves 17,250 spots open under the regular cap. Registration reopens.

In summary, on behalf of SHRM, we ask USCIS to make the modifications outlined in this comment to improve efficiency and to ensure fairness in the registration, selection and adjudication process. We strongly recommend that the agency refrain from implementing the changes until FY 2021 to allow for adequate consideration of stakeholder recommendations, as well as testing and vetting, and to provide sufficient notice to employers. We appreciate your consideration of our comments and recommendations.

Sincerely,



Emily M. Dickens, J.D.
Corporate Secretary and Chief of Staff